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6

7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
10

11 CORY SPENCER, an individual;
DIANA MILENA REED, an
12 individual; and COASTAL
PROTECTION RANGERS, INC., a
13 California non-profit public benefit
corporation;

14 Plaintiffs,

15 v.

16 LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including but
17 not limited to SANG LEE, BRANT
BLAKEMAN, ALAN JOHNSTON aka
18 JALIAN JOHNSTON, MICHAEL
RAE PAPAYANS, ANGELO
19 FERRARA, FRANK FERRARA,
CHARLIE FERRARA, and N.F.; CITY
20 OF PALOS VERDES ESTATES;
CHIEF OF POLICE JEFF KEPLEY, in
21 his representative capacity; and DOES 1
– 10,

22 Defendants.
23

Case No. 2:16-cv-02129-SJO-RAO

**OPPOSITION BY DEFENDANT
MICHAEL PAPAYANS TO
PLAINTIFFS’ MOTION FOR
ADMINISTRATIVE RELIEF;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

[Fed. Rules Civ. Proc., Rule 56(d)]

Date: September 5, 2017
Time: 10:00 a.m.
Place: Courtroom 10C
350 W. 1st Street
Los Angeles, California 90012

Hon. S. James Otero

[Concurrently Filed: Declaration of Peter
T. Haven with Exhibits]

24
25 Defendant Michael R. Papayans (“Papayans”) submits this Opposition to the
26 Motion for Administrative Relief filed by Plaintiffs Cory Spencer, Diana Milena
27 Reed, and Coastal Protection Rangers, Inc.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION AND SUMMARY OF OPPOSITION**

4 In March 2017, Defendant Michael Papayans responded to Plaintiff Corey
5 Spencer's request for production of documents and produced documents. In April,
6 Plaintiff's counsel and Defendant's counsel met and conferred in person regarding
7 the responses and production. During the meeting, Defendant's counsel advised
8 Plaintiff's counsel that one of the Defendant's prior cell phones had been taken into
9 evidence by the district attorney and investigators in another, unrelated proceeding.
10 In May, Plaintiff's counsel advised that he had spoken with the district attorney,
11 who indicated the phone could be released pursuant to a stipulated order, and
12 Defendant's counsel agreed. In June, Plaintiff's counsel forwarded a proposed
13 stipulation and order, and the parties modified and finalized the terms.

14 On July 12, the Magistrate Judge approved the stipulated order. The
15 stipulated order provided that the Defendant's cell phone would be submitted to the
16 Defendant's retained forensic consultant for information extraction, the parties
17 would then agree on proposed search parameters, and Defendant's counsel would
18 then have five (5) days after receiving an extraction report to review and produce
19 responsive information or assert appropriate objections. Exhibit 9, Order.

20 Plaintiff's counsel handled all communications with the district attorney.

21 The phone was delivered to Defendant's consultant on August 1, and on
22 Friday, August 4, Plaintiff's counsel submitted proposed search parameters
23 consisting of some 114 alleged names, some 114 telephone numbers, and a "partial"
24 list of some 54 email addresses. *See, infra*, pp. 6-9.

25 Given these broad proposed search parameters, it would take at least a
26 business day (if not more) to generate any extraction report, and Defendant would
27 then have five (5) days after receipt to review any such report prior to any actual
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1 production and/or assert appropriate objections. Under any scenario, any production
2 would have taken place well after the Monday, August 7 discovery cutoff.

3 Defendant's consultant, however, was unable to access the phone, despite
4 repeated unsuccessful attempts during the week of August 7 through 11. Defendant
5 cooperated during this process, supplied multiple pin codes, and attempted to access
6 the device by thumb-print recognition. Defendant's consultant recommended
7 sending the phone to a New Jersey-based provider, but Defendant's counsel was not
8 comfortable sending the device to the east coast for a period of weeks.

9 On August 14, Defendant's counsel contacted a Los Angeles third-party
10 provider requested by Plaintiff, Setec Investigations ("Setec"). After receiving
11 assurances from Setec that it would comply with the stipulated order calling for
12 Defendant to review any information prior to production, Defendant's counsel
13 retained Setec on August 15 and has now arranged to send the phone to Setec for
14 attempted extraction. It is not clear when or if Setec will access the phone. If
15 accessible, Defendant's counsel will still have five (5) days after receipt of any
16 extraction report to review and assert objections prior to any production.

17 Even if the phone was immediately accessible, no production would have
18 been possible prior to the August 7 discovery cutoff, due to, among other things,
19 Plaintiff's broad search parameters submitted on Friday, August 4. Plaintiff has not
20 met the burden of showing an entitlement to administrative relief. If the Court,
21 however, is inclined to grant Plaintiffs' motion for administrative relief, Defendant
22 requests that Defendant's summary judgment motion be continued.

23

24 **II. FACTS**

25 **A. The Agreement for the Stipulated Production of the Cell Phone**

26 On March 20, 2017, Defendant Papayans served document production
27 responses which complied with Rule 34 of the Federal Rules of Civil Procedure.

28

1 *See* Rule 34(a)(1) (documents under the party’s “possession, custody, or control.”);
2 Rule 34(b)(2)(B) (“the response must either state that inspection and related
3 activities will be permitted as requested or state with specificity the grounds for
4 objecting to the request, including the reasons.”). On March 24, Defendant’s
5 counsel also produced, among other things, a telephone extraction report for the
6 time period from January 2017 to the production date. *See* concurrently filed
7 Declaration of Peter T. Haven (“Haven Decl.”), Exhibit 1.

8 On April 7, Plaintiff’s counsel Victor Otten sent a meet-and-confer letter
9 requesting an in-person meeting by April 17. Haven Decl., Exhibit 2. On April 17,
10 Defendant Papayans’ counsel met with Mr. Otten in-person at Mr. Otten’s office.
11 During that meeting, Defendant Papayans’ counsel advised Mr. Otten that the
12 telephone extraction report began in January 2017, because Defendant Papayans had
13 two prior cell phones, one of which was lost in January 2017, and another which
14 was taken into evidence by the Los Angeles Police Department (“LAPD”) and/or
15 District Attorney’s (“DA”) office in approximately February 2016.

16 On May 4, Mr. Otten emailed that he had contacted the DA, and the DA
17 would release the phone pursuant to a stipulated order. *Id.*, Exhibit 3, p. 2.

18 On May 12, Defendant’s counsel also produced 83 pages of Mr. Papayans’
19 cell phone billing invoices from Oct. 7, 2015, through May 6, 2016 (covering dates
20 of service from around Sep. 9, 2015, through Mar. 13, 2016). *Id.*, Exhibit 3, p. 1.

21 On May 15, Defendant’s counsel agreed to stipulate to a cell-phone order,
22 with the phone released to the Defendant’s retained consultant, Meridian Discovery.
23 *Id.*, Exhibit 3, p. 1. The purpose of turning the phone over to the Defendant’s
24 consultant was to allow Defendant to review the information prior to any
25 production, and, if necessary screen and object to any irrelevant, private, and/or
26 otherwise non-responsive documents. On May 15, Defendant’s counsel asked
27 Plaintiffs’ counsel to “Please send me a proposed Stipulation.” *Id.*, Exhibit 3, p. 1.

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1 Over three weeks later, on June 8, Plaintiff’s counsel sent a proposed
2 Stipulation and Order. *Id.*, Exhibit 4. On June 15 and 19, Defendant’s counsel
3 made proposed revisions, and on June 23, Plaintiff’s counsel made further proposed
4 revisions. *Id.*, Exhibit 5.

5 On June 27, Defendant’s counsel *signed* the proposed Stipulation and Order
6 and sent it back to Plaintiff’s counsel. *Id.*, Exhibit 6. On June 29, Plaintiff’s
7 counsel made further changes, and on July 3 Defendant’s counsel *again signed* and
8 sent the proposed Stipulation and Order back to Plaintiff. *Id.*, Exhibit 7.

9 On July 10, the Magistrate Judge requested Plaintiffs’ counsel to email to the
10 Magistrate a Word version of the proposed Stipulation. *Id.*, Exhibit 8. Plaintiff’s
11 counsel’s response email stated, “Sorry for the delay.” *Id.*

12

13 **B. The Stipulated Order**

14 On July 12, the Magistrate signed the proposed Order. *Id.*, Exhibit 9.
15 Among other things, the stipulated Order stated that information would be extracted,
16 and then the parties would agree on search parameters:

17 Once preservation is complete, using parameters and instructions
18 agreed upon by the parties and provided to Meridian by Papayans’
19 counsel, Peter Haven, Meridian will perform search and filtering to
20 locate potentially responsive documents in the extracted data. These
21 documents will be provided to Mr. Haven for review.

22 Upon receipt of the information from Meridian, Mr. Haven
23 and his client shall have 5 days to review the information, assert
24 any appropriate objections and/or any appropriate “CONFIDENTIAL”
25 designation under the Protective Order, and produce non-objectionable
26 data or documents that are responsive to the Request for Production of
27 Documents.

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1 *Id.*, Exhibit 9, p. 2, l. 25 – p. 3, l. 1 (emphases added). Thus, the parties would have
2 to agree on search parameters and Defendant’s counsel would have five (5) days
3 after receipt of an extraction report to review for objections prior to any production.
4 The stipulated order also called for Meridian to return the phone to the LAPD upon
5 completion. *Id.*, p. 3, ll. 2-3.

6
7 **C. Plaintiffs’ August 4th Proposed Search Parameters**

8 Defendant’s counsel did not communicate with or contact the DA or LAPD.
9 Plaintiffs’ counsel handled *all* communications with the DA and/or LAPD.

10 On August 1, the phone was delivered to Meridian, but Defendant’s counsel
11 did not learn of the delivery until August 2. On the afternoon of August 2, Meridian
12 requested pin information to access the phone, which was supplied.

13 On August 3, Defendant’s counsel asked Plaintiffs’ counsel to consider
14 proposed search paramaters pursuant to the Stipulated Order. Defendant’s counsel
15 anticipated that Plaintiffs’ counsel would submit a reasonably tailored set of
16 proposed search parameters.

17 On August 4, however, Plaintiffs’ counsel, for the first time, sent broad
18 proposed search parameters consisting of an estimated 114 alleged names, an
19 estimated 114 telephone numbers, and a “partial list” of some 54 email addresses:

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21 “In an effort to make your job of reviewing the material prior to
22 production easier here is a list of names:”

- | | | | |
|----|-----------------|--------------------------|-----------------|
| 23 | ADAMS, BO | ROCCA | KENT, MIKE |
| 24 | ANT | SANDOVAL, MATIAS (DENIM) | KINION, DOUG |
| 25 | ANTHONY BEUKEMA | Skelton, Keenan | KURT ZIMMERMAN |
| 26 | ARICO, MARK | SNIPS | LEVY, EVAN |
| 27 | B MAN | STAFFORD, ZACK | LOGAN, |
| 28 | BACON, ROBERT | STRONG | LOSI CELL |
| | BARK, JOE | SULLY, JAMES | MASON, MARSHALL |

1	BEATTY, CHAD	SULY, JAMES	MEEK, BEN
	BEAUKEMA, CHARLEY	THIEL, MICHAEL	MILLER, ADAM
2	BENNETT, BROOKS	VAN DINE, SEAN	PAPAYANS,
	BINGMAN	WEEKLEY, JAN	MICHAEL(HOME)
3	BINGMAN HOME	(ADRIENNE)	PAPAYANS, MICHELLE
	Brian Whitten	ANDY CROFT	PATCH, ANDY
4	Bruce Vail Rorty	ANORGA, CARLOS	RAY WERNER?
	CAMPLIN, JESSE	APAYANS, MICHAEL S	RIGGLER
5	CAMPLIN, JOHN	BABROS, PETER	RING, BRAD
	CHILES, CHAD	BEAUKEMA, CHARLEY	SANDOVAL, NIC
6	CHRI MOSS	BERNSTEIN, JOSH	SNELL
	D BOY	BLAKEMAN, BRANT	STAFFORD, JASON
7	DELMONT, RICK	BLAKEMAN,	STEPHEN CALDWELL
8	DORYON, ELYAH	BRANT(HOME)	STONER, JEFF
	DUTSON, JAY	BRENDAN	STRAETER, FRED
9	FAIRBROTHER, CHARLIE	BUCK, JASON	TOPS
	FAIRBROTHER, STEVE	CALDWELL, MATT	Travers, Brad
10	FELDY	CALDWELL, STEPHEN	URCHIN
	FERRARA, FRANK	CAPPER, CHRISTIAN	WHITTEN, BRIAN
11	FRIA	CHAIRMAN, Dan	Yoakley, David
12	GAVIN, TIM	CHIMMER	
	GHALLAGER, COLM	Cobb, Austin	
13	HILTON, DAVID	COHEN, IAN	
	JESSUP	DEMARIA, DEVON	
14	KAEMERLE, BILL	DUTSON, JAY	
15	KIP ROZZI	FERRARA, ANGELO	
	LAMERS, ERIC M	FERRARA, CHARLEY	
16	LEE, SANG	FERRARA, CHARLIE	
	Logan	GODSYE, MICHAEL	
17	LOVASZ, GYORGY	GOPHER, JEFF	
	LUCAS? (JALIEN RECORDS)	Gray, Alex	
18	MELO, DAVID	HILTON, DAVID	
	MOWAT, CHARLIE	HUGOBOOM, PAUL	
19	PAPAYANS,	JACK BARK	
20	MICHAEL(HOME) OR	JACK BARK	
	ZIMMERMAN	JESSE CAMPLIN	
21	PAPS	JOHNSTON, ALAN	
22	PEREALT, JEAN	KAEMRLE, BILL?	

23 *Id.*, Exhibit 10, pp. 1-5.

24 Plaintiff's proposed August 4th search parameters also included the following
25 estimated 114 telephone numbers:

27 "Here is a list of numbers:"

28

1	310 755-8947	310 483-5143	310 291-7276
	310 533-7717	310 953-5878	310 948-4273
2	310 213-1229	310 980-9561	310 405-1817
	310 947-2918	310 593-1103	929 842-7208
3	310 877-6932	310 980-2059	310 462-9656
	310 755-8947	213 447-7607	310 291-5981
4	310 293-9621	310 428-7571	310-383-2724
	310 429-2463	310 809-9561	310-429-9028
5	310 612-2644	310 -418-6829	310 429-9028
	310-291-1726	310 714-2621	310 346-0569
6	310 625-1457	310 647-6080	310 418-3303
	310 951-4314	310 918-1212	310-377-3887
7	310 540-3812	310 947-0087	310 803-7317
	310 -200-6122	310 722-7879	760 807-4855
8	310- 375-0776	310-480-3207	310 991-6703
	310-346-0569	310 945-7222	310 951-9111
9	714 240-5102	310 251-2329	310 937-1833
10	310 903-2484	310 926-3906	310 467-3362
	310 892-6376	310 463-8210	310 722-3422
11	310-421-7590	310-371-7763	310 903-3766
	310 922-0503	310 541-5724 P	808 268-0547
12	213 842-4935	310 -292-1179	310 -378-7978
	805 534-8825	310-386-6790	310 792-9319
13	865 335-1527	310-351-8004	310-213-1505
	310-489-5549	424 477-7934	310-259-4162
14	310 613-9593	310-377-3917	310 567-1767
	310 753-1957	310 984-0907	310 503-3281
15	310 863-1958	310-383-2578	310 869-8418
	424 241-0846	310 541-4588	310 874-6726
16	310 951-2110	310-316-1104	310 944-5005
	310-291-5981	310 947-4772	310 619-4513
17	949 295-0111	310 408-0609	310 863-6442
	949 493-3101	310 445-3365	310 498-2818
18	310 594-2460	310 847-0661	808 329-3972
	310 985-4537	650 339-1711	310 704-7393
19	310 951-0699	310 753-5658	310 405-1817
	808 937-1833	805 704-5452	310-200-6122
20	310 544-0737	310 947-2760	310- 963-6889

23 *Id.*, Exhibit 10, pp. 5-9.

24 Plaintiff's proposed August 4 search parameters also included the following
25 "partial" list of some 57 emails:

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27 "Here is a partial list of emails:"
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ringersurfboards@hotmail.com	zendelrio@earthlink.net
roxygwen@charter.net	dj90274@yahoo.com
cmowat@gmail.com	joe@joebark.com
colm31136@earthlink.net	cstrong@bcws.com
lbcontrolagency@gmail.com	olsusana@aol.com
davemelo2002@yahoo.com	jcbeukema@charter.net
yoakswagon@yahoo.com	gwatts67@yahoo.com
derek.debraal@sbcglobal.net	michael.dempsey@abc.com
ericbinz@cox.net	lademan@gmail.com
geoff.dsena@turelk.com	brianwhitten1965@msn.com
gjelhelkas@wisherservice.com	specificprod@earthlink.net
jayduston@sbcglobal.net	gjahelka@swisherservices.com
joe@barkocean.com	croftconstruction@hotmail.com
patchman@socal.rr.com	rwfriedman@yahoo.com
arthurozzi@yahoo.com	jason.stafford@cox.net
me.griep@cox.net	christian.capper@turelk.com
mpaps@cox.net	lunadabayhilton@gmail.com
woodyris@yahoo.com	davefisk@rocketmail.com
peterb@remed.com	pvsurf@pvsurfcamp.com
credondobeach@yahoo.com	darrylstolz@gmail.com
ssfairbro@gmail.com	irwin5haps@cox.net
sullymusic@cox.net	dbabros@roadrunner.com
sangdangdoodle@yahoo.com	ylee64@hotmail.com
bruce@turnerbuilt.com	artrozzi@dreambrands.net
jc2332@aol.com	roxygwen@charter.net
artrozzi@dreambrands.net	colm31136@earthlink.net
feeogle@yahoo.com	jc2332@aol.com
mkent@farmersagent.com	joe@joebark.com
4bacons@cox.net	

Id., Exhibit 10, pp. 9-11.

D. Unsuccessful Attempts to Access the Phone

After Defendant’s counsel sent an August 3 email to Plaintiffs’ counsel requesting search parameters, Meridian advised Defendant’s counsel that it could not access the phone. Plaintiff’s counsel later advised Defendant’s counsel that the DA’s office had extracted information from the phone. It was unclear to Defendant’s counsel if the DA extraction process had interfered with Defendant’s ability to access the phone.

1 Defendant's counsel arranged for Defendant Papayans to meet with the
2 Meridian representative to try to access the phone.

3 That meeting took place at Defendant's counsel's office on Monday, August
4 7. Defendant tried to access the phone by thumb-print recognition, which was his
5 prior method of access. Defendant also supplied a number of pin codes, which were
6 not successful. Defendant's counsel consulted with Meridian regarding other ways
7 to access the phone, but Meridian was concerned that other methods might cause
8 loss of information on the phone. On August 10, Defendant again met with
9 Defendant's counsel and the Meridian representative to try additional pin codes
10 and/or to see if there was any other way to access the phone. The phone could not
11 be accessed, and Meridian recommended sending the phone to Cellebrite, Inc. in
12 Parsippany, New Jersey. Defendant's counsel did not want to send the phone to an
13 east-coast provider, and the stipulated order also indicated that Meridian was to
14 return the phone to the LAPD, which posed chain-of-custody concerns.

15 On August 10, Plaintiff's counsel stated, "the vendor who handled Defendant
16 Alan Johnston's phone had no trouble getting the information without a password.
17 Maybe we can send it there." *Id.*, Exhibit 11, p. 2. On August 11, Defendant's
18 counsel replied and stated, "I do not know the service used on Johnston's phone,
19" *Id.*, p.1. Plaintiff's counsel did not provide the vendor's name.

20 Defendant Johnson's counsel was away on vacation. Late on Friday, August
21 11, Defendant Johnson's counsel advised that the vendor was "Setec" and he
22 provided a local number. Defendant's counsel did not receive this information until
23 well after the close of business.

24 On Monday morning, August 14, Defendant's counsel communicated with a
25 Setec representative and learned that Setec had jointly worked with Plaintiffs and
26 Defendant Johnston. Defendant's counsel needed to confirm that Setec would be
27 able to be retained by solely by Defendant's counsel and comply with the stipulated
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1 order requiring Defendant to review all information prior to any production. After
2 receiving assurances, Defendant retained Setec on August 15 and has arranged for
3 Setec to access the phone for attempted extraction.

4
5 **III. ARGUMENT**

6 **A. Plaintiffs Seek Broad Discovery after the Discovery Cutoff**

7 Rule 56(d) of the Federal Rules of Civil Procedure provides:

8 If a nonmovant shows by affidavit or declaration that, for specified reasons, it
9 cannot present facts essential to justify its opposition, the court may:

10 (1) defer considering the motion or deny it;

11 (2) allow time to obtain affidavits or declarations or to take discovery; or

12 (3) issue any other appropriate order.

13 As shown by their August 4 broad proposed parameters, Plaintiffs are casting
14 a broad discovery net, not looking for specific “essential” facts. Such a broad
15 discovery request could not have been completed prior to the August 7 discovery
16 cutoff, even if the phone was immediately accessible. Plaintiff has not met the
17 burden of showing an entitlement to administrative relief. If the Court, however, is
18 inclined to grant Plaintiffs’ motion for administrative relief, then Defendant requests
19 that Defendant’s summary judgment motion be continued.

20 Papayans also joins in the oppositions of all other Defendants. *Vazquez v.*
21 *Central States Joint Bd.*, 547 F.Supp.2d 833, 867. (N.D.Ill. 2008).

22

23 DATED: August 15, 2017

HAVEN LAW

24

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By: /s/ Peter T. Haven

26

Peter T. Haven
Attorney for Defendant
MICHAEL R. PAPAYANS

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